

HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SPAM ARREST, LLC,

Plaintiff,

v.

REPLACEMENTS, LTD., et al.,

Defendants.

CONSOLIDATED

MASTER CASE NO. C12-481RAJ

ORDER

I. INTRODUCTION

This matter comes before the court on eight motions that the parties filed either in conjunction with their summary judgment motions or after briefing concluded on those motions. This order resolves the eight motions; a separate order resolves the summary judgment motions. The court reserves its in-depth discussion of the parties' substantive disputes for the separate order.

For the reasons stated below, the court GRANTS the parties' stipulated motion (Dkt. # 85) to dismiss claims against Defendant Replacements, Ltd with prejudice and without costs or attorney fees to any party. The court directs the clerk to TERMINATE all of the parties' motions to seal. Dkt. ## 26, 54, 63, 71. The end of part II.C. of this order concludes with instructions to the clerk as to which documents may remain under seal as well as instructions to the parties to refile documents that they improperly redacted. The court directs the clerk to TERMINATE the parties' redacted motions for

1 summary judgment. Dkt. ## 29, 49. The court will rely solely on the motions that the
2 parties filed under seal (Dkt. ## 35, 57), and resolves those in the separate order. The
3 court DENIES Plaintiff's motion to sever claims and to provide supplemental briefing.
4 Dkt. # 86.

5 **II. BACKGROUND & ANALYSIS**

6 **A. Motion for Voluntary Dismissal of Claims Against Replacements, Ltd.**

7 The court begins with the only one of these eight motions that was undisputedly
8 necessary. After briefing on the summary judgment motions had concluded, Plaintiff
9 Spam Arrest, LLC resolved its differences with Replacements, Ltd., one of the two
10 Defendants in this consolidated action. The parties filed a stipulated motion to dismiss
11 Replacements, leaving Sentient Jet, LLC and Sentient Jet Charter, LLC (collectively
12 "Sentient Jet") as the only Defendants.

13 **B. Spam Arrest's Motion to File Additional Briefing and Sever Claims**

14 By the time Replacements and Spam Arrest resolved their differences, the parties
15 had filed more than 125 pages of briefing on their cross-motions for summary judgment.
16 Spam Arrest apparently believed that it needed more. Once Replacements was no longer
17 part of the case, Spam Arrest filed a motion for leave to file more briefing so that it might
18 explain how Replacements' departure impacted the case. This would seem to be a tacit
19 admission that Spam Arrest's original briefing did not adequately highlight the
20 differences between its claims against Sentient Jet and its claims against Replacements.
21 The court disagrees. Supplemental briefing is decidedly unnecessary.

22 The court also declines Spam Arrest's request that the court sever its case against
23 Sentient Jet from its case against Replacements. The court has no idea why the dismissal
24 of Replacements as a party is not an adequate severance for Spam Arrest.

1 **C. Four Motions to Seal and Two Sealed Motions**

2 The two motions the court just discussed came after the parties completed briefing
3 on their summary judgment motions. The remaining six motions raise a host of disputes
4 over whether the court should keep under seal unredacted versions of the summary
5 judgment motions themselves and dozens of documents that support them.

6 In considering those disputes, the court begins with its local rules, specifically
7 Local Rule 5(g), which acknowledges the “strong presumption of public access to the
8 court’s files.” Local Rules W.D. Wash. LCR 5(g). Because filing *anything* under seal is
9 disfavored, the rules require the parties to meet and confer to “explore all alternatives to
10 filing a document under seal.” LCR 5(g)(1), 5(g)(3)(A). In particular, the rules require
11 parties to “redact[] sensitive information . . . *that the court does not need to consider.*”
12 LCR 5(g)(1)(B) (emphasis added). Only a party “who cannot avoid filing a document
13 under seal” should attempt to do so. LCR 5(g)(1)(B). A party must “minimize the
14 number of documents it files under seal and the length of each document it files under
15 seal.” LCR 5(g)(4). Only in “rare circumstances” should a party file an entire motion
16 under seal. LCR 5(g)(5).

17 The court’s reluctance to seal documents is at its height when the documents
18 support a dispositive motion. *Kamakana v. City & County of Honolulu*, 447 F.3d 1172,
19 1179 (9th Cir. 2006). Dispositive motions, like trials, are “at the heart of the interest in
20 ensuring the public’s understanding of the judicial process and of significant public
21 events.” *Id.* (quotation omitted). A party must provide “compelling reasons” for sealing
22 any document associated with a dispositive motion. *Id.* The court then balances those
23 reasons against the competing public interests. *Id.*

24 Despite the requirement that they minimize the number of documents under seal,
25 the parties have collectively filed more than 30 documents under seal in conjunction with
26 their summary judgment motions. The court will not address each document

1 individually, although this order will conclude with instructions to the clerk and to the
2 parties as to each document. Three general explanations will suffice.

3 First, the parties sealed many documents because they include email addresses or
4 other identifying information for Spam Arrest customers and (less frequently) other third
5 parties. Spam Arrest's desire to redact its customers' email addresses is understandable;
6 it can hardly purport to protect its customers from spam while publicizing their email
7 addresses. What is not understandable is why the parties believe that the unredacted
8 email addresses are of any value to the court. Every Spam Arrest customer has a unique
9 identification number. With one exception (Dkt. # 43), every document the parties have
10 filed that contains a customer's email address either contains identification numbers
11 (permitting the court to identify individual customers in documents that aggregate data on
12 hundreds of customers) or is a document in which the email address makes no difference
13 whatsoever. The parties were either aware or should have been aware that the email
14 addresses would play no part at all in the court's consideration of these motions. There
15 was thus no need to file unredacted versions those documents under seal, and the parties
16 violated LCR 5(g)(1)(B) by doing so. The same is true of an exhibit with a redacted
17 credit card number, accompanied by a sealed exhibit revealing the credit card number.
18 The credit card number is not useful to the court; the parties should have simply redacted
19 it without burdening the court with another sealed document. The duty to minimize the
20 number of documents filed under seal carries with it the duty to exercise judgment about
21 redacting extraneous information. The parties too frequently abandoned that duty.

22 Second, Spam Arrest has taken frivolous positions with respect to some
23 documents. In several instances, Spam Arrest either filed a document under seal or
24 required Sentient Jet to file a document under seal only to later concede that there was no
25 basis to seal the document. In one instance, Spam Arrest took the position that it could
26 seal the names of customers providing declarations on its behalf. Spam Arrest did not

1 explain how it could hide the names of its witnesses from the public. Later, it filed the
2 same declarations publicly, redacting only email addresses.

3 Third, Spam Arrest takes the position that virtually every piece of data about its
4 business is confidential, while offering little or no evidence to support that position.¹
5 That “confidential” data includes, but is not limited to, the following: the number of
6 Spam Arrest customers at various times, the number of customers who have left Spam
7 Arrest at various times, Spam Arrest’s profits and losses, Spam Arrest’s aggregate
8 revenue and revenue per customer, Spam Arrest’s calculations of “downstream revenue”
9 for its customers, Spam Arrest’s advertising expenditures, and how much Spam Arrest
10 charges its customers.

11 Although Spam Arrest insists that this information is confidential, it has not
12 provided a shred of evidence from any person at Spam Arrest who can explain why the
13 data is confidential. Instead, Spam Arrest relies on cursory declarations from its counsel.
14 These are wholly insufficient.

15 Spam Arrest fails to acknowledge, moreover, that the data it seeks to protect is
16 critical to the court’s consideration of the pending summary judgment motions. One of
17 the core issues in those motions is whether the court can enforce a liquidated damages
18 clause purporting to award \$2,000 for even a single email sent in violation of Spam
19 Arrest’s Sender Agreement. That issue depends, in turn, on whether \$2,000 is a
20 reasonable forecast of damages arising from spam. Spam Arrest attempts to justify that
21 figure by relying on “downstream revenue” data, whereas Sentient Jet attempts to
22 demonstrate that the figure is unreasonable by noting that it is grossly disproportionate to
23 Spam Arrest’s revenues and profits. The data that Spam Arrest seeks to shield from
24 public view is central to the summary judgment motion. Anyone reading the court’s

25 ¹ Both parties repeatedly reference the agreement they made regarding the exchange of
26 information they deemed “confidential” during discovery. The motions before the court amply
27 illustrate that although agreements like that one may be useful to the parties as they conduct
28 discovery, they are of no value in determining whether documents may remain under seal.

order on those motions will see that Spam Arrest's "confidential" information was central to the court's decision to invalidate the liquidated damages clause it inserted into its Sender Agreements. Spam Arrest has proffered no legitimate reason to seal that data. In rare instances, the reason for sealing a document is arguably self-evident. For example, the court has elected to keep under seal a collection of Spam Arrest's profit-and-loss statements. But for the most part, Spam Arrest is content to simply assert that documents are "confidential" without providing evidence or argument that suffices to overcome the presumption of public access.

What follows is a table of every document currently under seal in this case, along with a determination of whether it may remain under seal. The clerk shall unseal every document marked "UNSEAL." All other documents may remain under seal for now. But, where the court uses the notation "REDACT & REFILE," the party responsible for filing the document under seal must publicly file a document that has been redacted in accordance with the court's instructions. If the party does not file the redacted document by August 28, 2013, the clerk will unseal the underlying document. Each party shall file a single document that contains every re-filed document as an exhibit or attachment. The main document shall include an index that clearly identifies the sealed document to which each re-filed document corresponds.

In a few instances, the court has declined to unseal documents that provide information only about Replacements. The court does not suggest that any party had a legitimate basis for sealing those documents, only that the documents were ultimately not relevant to the disposition of the parties' dispositive motions.

Dkt. No.	Action	Comments
35	UNSEAL	
36	UNSEAL	
37	UNSEAL	

38	REDACT & REFILE	Redact customer email addresses and physical addresses.
39	REDACT & REFILE	Redact customer email addresses and physical addresses.
40	UNSEAL	
41	UNSEAL	
42	REMAIN SEALED	
43	REMAIN SEALED	
44	REMAIN SEALED	
57	UNSEAL	
58	UNSEAL	
59	UNSEAL	
59-1	UNSEAL	
59-2	REMAIN SEALED	
59-3	REMAIN SEALED	
60	UNSEAL	
60-1	REDACT & REFILE	Shavell Report. Ex. D may remain redacted. All other redactions must be removed and document refiled.
60-2	REMAIN SEALED	
60-3	REMAIN SEALED	
60-4	REDACT & REFILE	May redact customer email addresses only, not customer names or any other information.
60-5	REMAIN SEALED	
60-6	REMAIN SEALED	
60-7	REMAIN SEALED	
64	UNSEAL	
65	UNSEAL	
73	UNSEAL	
73-1	REMAIN SEALED	

73-2	REDACT & REFILE	May redact customer email addresses and physical addresses (at street level), may not redact any other information. ²
74	UNSEAL	
74-1	REMAIN SEALED	
74-2	REDACT & REFILE	May redact customer email addresses only, may not redact customer revenue information or any other information.
74-3	REMAIN SEALED	

III. CONCLUSION

These motions, particularly as they relate to the parties' battles over sealing and redacting documents, suggest a disregard for efficient litigation that has greatly and unnecessarily complicated the court's consideration of this case. The summary judgment motions are complex enough, relying on thousands of pages of documents and over a hundred pages of briefing. These ancillary motions served no purpose but to make it much more difficult for the court to consider the evidentiary record.

The court makes these comments not to chastise the parties, but to point out how the parties have injured themselves. The cross-motions for summary judgment became ripe for the court's consideration on February 8. It is now August. No one prefers to wait this long for the resolution of a motion, and the court strongly prefers to resolve motions much more quickly. But as the parties' motions multiplied, as two motions turned into eight and then ten, it became apparent that it would take the court substantial time even to resolve the ancillary disputes, to say nothing of the substantive disputes at the core of the case. This court presides over more than 200 civil cases, to say nothing of what has recently been an active criminal docket. It is difficult to ignore other cases in favor of any single case. Once the parties had placed ten motions supported by hundreds of documents, once the parties had split those documents into a tangled array of sealed and unsealed declarations, and once the parties had compounded the court's review of the

² This document is an unwieldy spreadsheet that is more than 90 pages long. Spam Arrest did not provide a courtesy copy of the document, as was the case with virtually all of the documents it filed in conjunction with its reply brief.

1 evidence with a host of motions to strike, it became apparent that it could resolve these
2 motions only by devoting weeks of its time. During those weeks, the court would be able
3 to accomplish little else. As a consequence, the court could turn to these motions only in
4 when it could justify diverting substantial resources away from its remaining caseload for
5 a substantial period of time. The court conservatively estimates that it took more than
6 100 hours to resolve these motions.

7 The court understands that some disputes demand more of its resources than
8 others. Even without the ancillary disputes, these motions would have taken substantial
9 time to resolve. Most (if not all) of the ancillary disputes, however, were unnecessary.
10 The parties could have and should have resolved them themselves, rather than foisting
11 them upon the court. In short, the court urges the parties (and any attorneys who might
12 review this order) to consider whether the approach the parties took here is in anyone's
13 interest. If the parties hoped to receive prompt rulings on their motions for summary
14 judgment, then there is no question that the approach they took in this case was
15 antithetical to their interests.

16 For the reasons previously stated, the court GRANTS the parties' stipulated
17 motion (Dkt. # 85) to dismiss claims against Defendant Replacements, Ltd with prejudice
18 and without costs or attorney fees to any party. The clerk shall TERMINATE
19 Replacements as a party.

20 The court DENIES all of the parties' motions to seal (Dkt. ## 26, 54, 63, 71),
21 directs the clerk to UNSEAL the documents identified on the table above, and directs the
22 parties to comply with the court's instructions for refiling certain documents by August
23 28, or the court will direct the clerk to unseal those documents as well.

24 The court directs the clerk to TERMINATE the parties' redacted motions for
25 summary judgment. Dkt. ## 29, 49. The court will rely solely on the motions that the
26 parties filed under seal (Dkt. ## 35, 57), and will resolve those in a separate order.

1 The court DENIES Spam Arrest's motion to sever claims and to provide
2 supplemental briefing. Dkt. # 86.

3 DATED this 20th day of August, 2013.

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6 The Honorable Richard A. Jones
7 United States District Court Judge
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